Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM 1976

~~No. 75-1896~~

76-658

NORFOLK, BALTIMORE AND CAROLINA LINES, INC., and LIBERTY MUTUAL INSURANCE COMPANY, ——— *Petitioners,*

-versus-

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR; and LEE ROUSE (Deceased), ——— *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR; and LEE ROUSE (Deceased), _____ *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Your petitioners Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company would respectfully show this Honorable Court pursuant to the provisions of Rule 23 of the Revised Rules of the Supreme Court of the United States as follows:

(a) References to the official and unofficial reports of the opinions delivered in the courts and administrative agencies below include as follows: *Rouse v. Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company*, 75-LHCA-241 (1975); *Rouse vs. Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company, 2 BRBS 229 (ALJ) (1975); Rouse vs. Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company*, 2 BRBS 11 (1975); *Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company vs. Director Office of Workers' Compensation Programs, United States Department of Labor, Benefits Review Board, United States Department of Labor and Lee Rouse (Deceased)*, 4 BRBS 245 (4th Cir. Case No. 75-1896, decided Aug. 6, 1976).

(b) The grounds on which the jurisdiction of the Supreme Court of the United States are invoked are those provided in 28 U.S.C.A. §1254 (1) permitting review by the Supreme Court upon petition of any party to a civil case for a writ of certiorari. The decree or opinion sought to be reviewed was decided and entered by the Court of Appeals for the Fourth Circuit on August 6, 1976 affirming the decision of the Benefits Review Board approving the conclusions of Administrative Law Judges Miller and Fath directing an award under 33 U.S.C.A. §909 to the widow and children of Lee Rouse. By Order filed September 17, 1976, and signed for the Court by Direction by William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, the Petitioners' Petition for Rehearing and suggestion for rehearing en banc were denied. The Petitioners believe that the provisions of 28 U.S.C.A. §1254 (1) confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review are as follows:

(1) Is the retrospective application of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation

Act unconstitutional as a denial of due process of law and as an impairment of the obligation of pre-existing contracts as proscribed by the Fifth Amendment of the United States Constitution and cases decided thereunder?

(2) Do the various sections of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 (33 U.S.C.A. §901 *et seq.*) contain incongruities and inconsistencies which are so conflicting as to present an irreconcilable confusion, thereby rendering the application of the attempted amendments impractical and impossible?

(3) Does the 1972 amendment undertaking to provide benefits for death unrelated to maritime employment exceed the constitutional grant of admiralty and maritime juirisdiction in Article III, Section 2, Clause 1 of the United States Constitution, and does its application in this case constitute a denial of due process of law as an excess of Congressional power?

(d) This case involves the following statutes:

(1) 33 U.S.C.A. §909, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972:

> "If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: . . ."

(2) 33 U.S.C.A. §902(11), Longshoremen's and Harbor Workers' Compensation Act:

> "(11) 'Death' as a basis for a right to compensation means only death resulting from an injury."

(3) 33 U.S.C.A. §902(2), Longshoremen's and Harbor Workers' Compensation Act:

> "(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such

occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

(4) 33 U.S.C.A. §903(a), Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . ."

(5) Article III, Section 2, Clause 1, United States Constitution:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject."

(6) Amendment V, United States Constitution:

"Criminal actions — Provisions concerning — Due process of law and just compensation clauses. — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(e) The facts of this case material to the consideration of the questions presented are undisputed. On July 6, 1956, Lee Rouse was working as a longshoreman on board and engaged in unloading cargo from a barge owned by the Petitioner Norfolk, Baltimore and Carolina lines, Inc. on navigable waters of the Cooper River in Charleston, South Carolina. He was injured in the course of his employment when a large bale of wool fell upon him. As a result of the accident, he sustained fractures of the right femur, comminuted fractures of the left femur, a compound fracture of the right tibia, paralysis of the left foot, and fractures of the ribs on the right with hemopneumothorax. He thereafter filed a claim for compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. By final compensation order of the Deputy Commissioner dated September 25, 1969, Lee Rouse was determined to be permanently and totally disabled and was awarded applicable disability benefits. Rouse never worked after his injury in 1965. At all times when he was employed, injured, and found disabled, the law allowed death benefits only "if the injury causes death". In 1972 the Act was amended creating benefits for the first time for death from "causes other than the injury". 33 U.S.C.A. §909

Lee Rouse was hospitalized in July, 1973, with a diagnosis of chronic obstructive pulmonary disease. He was again hospitalized in 1974 and died on February 11, 1974. It has been conclusively found that Lee Rouse died from causes other than the injury sustained in 1965 upon which compensation was awarded. Thus, the death was not related to or a result of the injury.

Lee Rouse left surviving him a common law widow and three dependent children. Lee Rouse's compensable accidental injury occurred before the 1972 amendments, and his unrelated death occurred some two years after the effective date of the amendments.

(f) Not applicable.

(g) The basis for jurisdiction of the federal court and the court of first instance is furnished by the provisions of 33 U.S.C.A. §§901, *et. seq.*, governing the adjudication of claims brought under the Longshoremen's and Harbor Workers' Compensation Act together with routes of appeal from the decision of an Administrative Law Judge to the Benefits Review Board and, thereafter, to the United States Court of Appeals. 33 U.S.C.A. §§919, 921, and 922.

(h) The Petitioners respectfully urge that this Court grant the within Petition for a Writ of Certiorari on the grounds that the United States Court of Appeals for the Fourth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. This litigation presents a novel question of the interpretation of the 1972 amendment to Section 9 of the Longshoremen's and Harbor Workers' Compensation Act providing for the first time thereunder death benefits for dependents of a permanently and totally disabled maritime worker who thereafter dies from causes other than his compensable injury. The 1972 amendments created this new benefit for the first time in the scheme of maritime compensation, and such benefit is a

stranger to the law of workmen's compensation, which for decades has traditionally required some connection or relationship between the accident, injury or death and the employment. Your Petitioners believe that the instant case presents the first opportunity the United States Supreme Court has had occasion to consider and interpret this congressional amendment which will have lasting, substantial, and monumental effects in the field of compensation law under the Longshoremen's and Harbor Workers' Compensation Act, the benefits of which Congress has vastly extended to include the District of Columbia, Defense Bases, Outer Continental Shelf Lands, and Nonappropriated Fund Instrumentalities. Your Petitioners are informed and believe that several, and most probably many, other cases of this nature are pending in the lower courts and administrative agencies and/or will be filed in the future and that a need exists for a determinative interpretation of the amendment to Section 9 to clear up and finally ascertain the validity or invalidity of such amendment. Obviously, there are numerous persons now living as permanent and total disabilitants, all of whom must die sooner or later from some cause — many of these deaths will be unrelated to the injury. These persons, their statutory beneficiaries, and their employers and insurance carriers will all be affected by this new death benefit. Your Petitioners urge that an interpretation thereof by this Court is imperative and extremely important.

(i) Appended hereto are copies of all relevant opinions, six (6) in number, delivered upon the rendering of the decree or opinion sought to be reviewed, including all opinions of the courts and administrative agencies in this case.

WHEREFORE, your Petitioners respectively urge that this Court issue its Order granting them a Writ of Certiorari to review the decision herein of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

CHARLES H. GIBBS
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Attorneys for the Petitioners

Charleston, South Carolina

November 3, 1976.

APPENDIX

In the Matter of

LEE ROUSE, deceased
Claimant

vs.

NORFOLK, BALTIMORE AND CAROLINA LINES, INC.
Employer

LIBERTY MUTUAL INSURANCE CO.
Carrier

Case No. 74-LHCA-241

Formerly Case No. 555-42

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Neighborhood Legal Assistance
119 Spring Street
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For the Employer
and Carrier

Linda L. Carroll, Attorney
(William J. Kilberg, Solicitor of Labor
Cornelius S. Donoghue, Jr., Associate Solititor)
United States Department of Labor
Washington, D. C. 20210
For the Director, Office of
Workers' Compensation
Programs Party in Interest

BEFORE: MARSHALL E. MILLER
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to the Provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereafter the "Act"), 33 U.S.C. 901, *et seq.*, a hearing was held in Charleston, South Carolina on September 27, 1974. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, to examine witnesses and to make oral argument. Thereafter the parties submitted briefs, which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all other evidence adduced at the hearing, I make the following Findings of Fact, Conclusions of Law, and Order.

Facts

On July 6, 1965 the Decedent was working as a longshoreman on board and engaged in unloading cargo from a barge on navigable waters. He was injured in the course of his employment when a 1,000 pound bale of wool fell upon him. As a result of the accident, he sustained fractures of the right femur, comminuted fractures of the left femur, compound fracture of the right tibia, paralysis of the left foot, and fractures of the ribs on the right with hemo-pneumothorax. By a final compensation order of the Deputy Commissioner, dated September 25, 1969, the Decedent was determined to be permanently and totally disabled, and he was awarded disability benefits.

The Decedent was hospitalized for 26 days in July, 1973 with a diagnosis of chronic obstructive pulmonary disease. He was again hospitalized in January, 1974 and died on February 11, 1974. The cause of death given in the death certificate was cardio-respiratory arrest due to chronic

obstructive lung disease, with probable pneumonia, a significant condition. These findings were consistent with the hospital records. No autopsy was performed. There was no medical testimony or evidence to relate death to the 1965 injuries.

The Decedent left surviving a common law widow, Nellie Smith Rouse, who was dependent upon him. The parties lived together as man and wife from 1958 to the date of death, and a common law marriage existed between them. The Decedent also left three minor children of the parties who were dependent upon him, namely Patricia Ann Smith, born April 17, 1961; David Charles Smith, born July 17, 1963; and Doreen Renee Rouse, born January 26, 1967. At the time of his death the Decedent was being paid compensation for permanent total disability at the rate of $40.06 per week, based on an average weekly wage of $60.08.

Opinion

There is no medical evidence or other credible testimony to establish any connection between the 1965 injuries and the death of the Decedent on February 11, 1974. Accordingly, it must be held that the Decedent died from causes unrelated to the injury.

The primary question then concerns the issue whether the widow and children are entitled to death benefits under the 1972 amendments to §9 of the Act. Prior to the amendments, death benefits were payable only if the death was causally related to an employment injury. However, §5(d) of the 1972 amendments amended §9 of the Act to provide:

> "If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit

of the persons following."

§22 of the amendments (86 Stat. 1251, 1265) provides:

> "The amendments made by this Act shall become effective thirty days after the date of enactment of this Act."

The amendments were enacted October 27, 1972 and therefore became effective November 26, 1972.

The Employer and Carrier contend in an able brief that an award of death benefits in this case would be a retroactive application of the amended law, and hence an unconstitutional deprivation of property without due process of law, and an impairment of the obligations of contract. However, these contentions cannot be sustained.

It must be borne in mind that the Act gives two separate and distinct causes of action, one relating to compensation for injury payable to the injured employee, and the other relating to death benefits payable to the dependents.[1] As the court stated in *International Mercantile Marine Co. v. Lowe*, 93 F. 2d 663, cert. denied 304 U.S. 565, 58 S. Ct. 948;

> "But the disability benefits fixed by §8 of the act and the right of the widow to death benefits under §9 are different. They have different claimants thereto; one arising in the event of injury not resulting in death and the other arising only in the event of death. They were separately provided for by separate sections of the act and accrue on different bases. The amount to which the widow or next of kin is entitled is for their exclusive benefit and is entirely separate and distinct from the compensation for disability allowed the employee."

[1]Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F. 2d 76 (1950); Hitt Cardillo, 131 F. 2d 233 (1942).

The separate right to death benefits is governed by the law in effect on the date of death when the cause of action accrued, even though the injury was prior. In *Moore v. Troop D*, 267 App. Div. 466, 47 N.Y.S. 2d 27, the court said:

> "The rights of the parties arising from the death of an injured workman are fixed as of the date of death. The right to death benefits springs into existence at that time and the law which must control the compensation to be paid is that which was in effect when the right came into existence."

Here, Congress did not restrict the applicability of amended §9 to claims wherein the employment injury occurred after the effective date of the amendment. All that is required is that the death occur after the effective date, where an employee had sustained permanent total disability due to an injury and thereafter died from causes other than the injury. Since the widow's cause of action did not arise until the event of death, granting benefits to her and the minor children is a prospective, not a retroactive application of the amended law.[2]

Counsel for the Employer and Carrier has properly raised questions concerning the constitutionality of amendments to the Act at the earliest opportunity. However, it has been held that an administrative proceeding is not the proper forum for testing constitutional issues.[3] Moreover, it is well established that an administrative tribunal must assume the validity of the legislation which it adminsters.[4]

[2]Spence v. Terminal Shipping Company, 75 LHCA 22 (November 6, 1974).

[3]Engineers Public Service Co. v. S. E. C., 138 F.2d 936 (1943); Public Utilities Comm. of Cal. v. United States, 355 U. S. 534, 78 S. Ct. 446 (1958); Panitz v. District of Columbia, 112 F. 2d 39 (1940).

[4]Budler v. First Nat. Bank, 16 F. 2d 990 (1927), cert. denied 274 U.S. 743 (1927); Southern Boulevard R. Co. v. City of New York, 86 F. 2d 633 (1936).

For foregoing reasons, the surviving widow and three minor children of the Decedent are entitled to compensation as death benefits under the Act as amended, together with reasonable attorney's fees to counsel for the Claimants.

ORDER

1. The Employer and Carrier shall pay compensation as death benefits under §9 of the Act as amended, to the surviving widow, Nellie Smith Rouse, at the rate of 50 per centum of the average wages of the deceased during widowhood, and the additional amount of 16 2/3 per centum of such wages to the three minor children of the parties, Patricia Ann Smith, David Charles Smith and Doreen Renee Rouse, beginning February 12, 1974. Such payments shall be made in bi-weekly installments under the limitations of the Act, until otherwise ordered.

2. All compensation installments due and unpaid to the date of this Order shall be paid forthwith in a lump sum, and shall bear interest at the rate of 6 percent per annum from the date each installment was due until finally paid.

3. Reasonable funeral expenses not exceeding $1,000.00 shall be paid or reimbursed by the Employer and Carrier.

4. The Employer and Carrier shall pay directly to Stephen T. Schachte, Esquire, attorney for the Claimants, the sum of $200.00 as reasonable attorney's fees, pursuant to §28 (a) of the Act.

s/Marshall E. Miller
MARSHALL E. MILLER
Administrative Law Judge

Dated: November 13, 1974
Washington, D. C.

LEE ROUSE (Deceased)
Claimant-Respondent

v.

NORFOLK, BALTIMORE AND CAROLINA LINES, INC.

and

LIBERTY MUTUAL INSURANCE COMPANY

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

BRB No. 75-101

DECISION

Digest Section **Syllabus**

1059 The right to death benefits under the Longshoremen's Act arises at the time the injured employee dies, and the law governing the question of whether death benefits are payable is the law in effect when death occurs. The Act gives one cause of action to the injured employee for compensation for injury and another, separate cause of action to the dependents for death benefits. When death occurs

a new cause of action is created. p. 14

1100 Congress has the power to create rights and remedies for deaths unrelated to compensable accidents. p.15

1100 Congress' creation of survivor benefits following a disabling maritime injury without requiring proof that the injury caused death is a valid exercise of its power to define the extent of admiralty and maritime jurisdiction in light of new concepts of maritime concerns. p. 16

1302 Death benefits under the Longshoremen's Act were erroneously computed at the rate of 100 percent of decedent's wages, since the Act provides that such benefits shall be computed according to the "applicable national average weekly wage as prescribed by Section 6(b)." p.17

Appeal from Decision and order of Marshall E. Miller, Administrative Law Judge, United States Department of Labor.

S. T. Schachte (Neighborhood Legal Assistance), Charleston, South Carolina, for the claimant.

Charles H. Gibbs, Charleston, South Carolina, for the employer/carrier.

Linda L. Carroll (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor, United States Department of labor), Washington, D. C., for the Director, Office of Workers' Compensation Programs.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer and carrier (hereafter referred to as the employer) seeking review and reversal of a Decision and Order (74-LHCA-241) of Administrative Law Judge Marshall E. Miller dated November 13, 1974 awarding the surviving widow and three minor children of decedent death benefits, interest, funeral expenses, and attorney's fee. The claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compenstion Act, as amended, 33 U.S.C. §901 *et seq.* (hereafter referred to as the Act).

Decedent was injured on July 6, 1965 when, in the course of his employment, a 1,000 pound bale of wool fell on him while he was engaged in unloading cargo from a barge. In his compensation order dated September 25, 1969, the deputy commissioner found decedent's disability to be permanent and total and awarded compensation accordingly. In July 1973 and again in January 1974, decedent was hospitalized for chronic obstructive pulmonary disease. Decedent died on February 11, 1974, and there was no medical testimony or evidence relating death to his 1965 injuries.

A common-law widow, as well as three minor dependent children, survived decedent and claim death benefits pursuant to Section 9 of the Act. 33 U.S.C. §909. At the time of his death, decedent was being paid permanent total disability benefits at the rate of $40.06 per week, based on an average weekly wage of $60.08.

The administrative law judge held that Section 9 of the Act is applicable and awarded death benefits to the surviving widow in the amount of 50 percent of the average weekly wages of the decedent and, additionally, 16 2/3 percent of

such wages to the three minor children.

The employer appeals contending that amended Section 9 of the Act is inapplicable to the facts of this case, that it is unconstitutional as retroactive and a denial of due process, that statutory inconsistencies render the application of amended Section 9 impossible, that Congress has exceeded its grant of admiralty and maritime jurisdiction in enacting the 1972 Amendments to Section 9, and that any award of death benefits should be paid by the Special Fund.

The key issue to be resolved by this Board is whether the application of amended Section 9 of the Act to the particular facts of this case is in accordance with law. The Board holds that it is. Section 9 of the amended Act provides, in part:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit . . . .

On November 26, 1972, the effective date of the Amendments to the Act, decedent's disability was permanent and total. However, because the injury occurred prior to November 26, 1972, the employer contends that the law in effect on the date of decedent's work-related injury governs the question of whether death benefits should be paid decedent's widow and children. Such an argument is necessarily premised on the assumption that disability benefits and death benefits are a single cause of action governed solely by the date of injury. The employer's contention is without legal foundation.

The courts have consistently held that the Act gives one cause of action to the injured employee for compensation for injury and another, separate cause of action to the dependents for death benefits. When death occurs, a new cause of action is created. *See Hampton Roads Stevedoring Corp. v.*

O'Hearne, 184 F.2d 76 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663 (2d Cir. 1938), *cert. denied*, 304 U. S. 565 (1938); *Penn Jersey Welding Co. v. Lowe*, 183 F.2d 936 (3rd Cir. 1950); *Travelers Insurance Co. v. Toner*, 190 F. 2d 30 (D.C. Cir. 1951). Thus, the right to death benefits is a right which arises at the time the injured employee dies, and the law governing the question of whether death benefits are payable is the law in effect when the right arises.

Here, although decedent's injury occurred prior to November 26, 1972, the effective date of the Amendments, death did not occur until after that date. Such being the case, the Board is of the opinion that application of amended Section 9 of the Act to the facts before us would not be unconstitutionally retroactive. Merely because application of the amended Act may relate to antecedent events is not enough. To be constitutionally objectionable, the effect of the amended Act must be to disturb or destroy a vested right or impair a legal obligation in existence prior to the effective date of the 1972 Amendments. Here, the right of the widow and her children to claim death benefits did not arise until the date of decedent's death, nor did the employer have any potential obligation to pay death benefits until that date.

The Board now turns to a consideration of the remaining issues presented in the employer's petition for review. It is noted, first of all, that constitutional questions may properly be raised before this Board if a party desires an adjudication concerning them. *Kelly v. Handcor, Inc. and St. Paul Fire and Marine*, 1 BRBS 319, BRB No. 74-165 (Feb. 28, 1975). The employer contends that the Amendments to Section 9 of the Act are unconstitutional as a denial of due process in that Congress does not have the power to create rights and remedies for deaths unrelated to compensable accidents. Basically, due process of law protects the individual against arbitrary governmental action, the test being essentially one of reasonableness. If legislation has a reasonable relation to a

proper legislative function and purpose, and is not arbitrary, then due process is satisfied. Here, at the time of his death, decedent was totally and permanently disabled as a result of an injury sustained in the course of his employment. Congress, in enacting the 1972 Amendments to the Act to provide death benefits for the widow and dependent children, was acting pursuant to its power to promote the general welfare. The decedent, after his work-related injury, was not in the same position to provide for his family's support after death as he would have been had he not been injured. Congress has deemed, in those cases involving permanent total disability, that the employer share in the loss suffered by decedent's family. We cannot say such legislation is unreasonable or artibrary.

The employer further argues that conflicting, inconsistent statutory language renders application of amended Section 9 of the Act impossible. It is true that the Amendments to Section 9 of the Act, when read in conjunction with various other unamended definitions, are inconsistent and not totally harmonious. However, such inconsistencies are not fatal to the Amendments since the express language of amended Section 9 cannot support another reasonable interpretation. Therefore, the unequivocal language of amended Section 9 must prevail over the inconsistent unamended provisions of the Act as the latest declaration of legislative intent.

It is also argued by the employer that Congress has exceeded its constitutional grant of admiralty and maritime jurisdiction in Article 3, Section 2, Clause 1 of the Constitution by providing compensation for death unrelated to maritime employment. Congress has paramount power to determine the maritime law which shall prevail throughout this country and may alter, qualify, or supplement it as experience or changing conditions require. *Thomas Barlum*, 293 U.S. 21 (1924). The decision of Congress to create survivor benefits

following a disabling maritime injury, without requiring proof that the injury caused death, is a valid exercise of its power to define the extent of admiralty and maritime jurisdiction in light of new concepts of maritime concerns.

The employer further contends that any award of death benefits in this case should be paid by the Special Fund. Such a contention is without merit. Section 44(j) of the Act, 33 U.S.C. §944(j), expressly provides the purposes for which the Special Fund is to be used. There is no statutory authority allowing the Special Fund to pay benefits due pursuant to Section 9 of the Act.

The Board notes that the administrative law judge failed to consider whether a ten percent penalty must be assessed against the employer pursuant to Section 14(c) of the Act. 33 U.S.C. §914(e). Such a penalty is mandatory unless the employer filed a timely notice of controversion pursuant to Section 14(d) of the Act or upon a showing that timely payment could not be made as a result of conditions beyond the employer's control. *McCabe v. Ball Builders*, 1 BRBS 290, BRB No. 74-181 (Jan. 31, 1974); *Ryan v. McKie Co. and Liberty Mutual Insurance Co.*, 1 BRBS 221, BRB No. 74-160 (Dec. 10, 1974).

Finally the administrative law judge, in his Order, awarded compensation to the widow at the rate of 50 percent of the average weekly wage ($60.08) of the decedent and the additional amount of 16 2/3 percent of the wages to the three minor children. Such a determination was erroneous. Section 9(e) of the Act, 33 U.S.C. §909(e), provides a minimum level of death benefits wherein the average weekly wages of the decedent ". . . shall be considered to have been not less than the applicable national average weekly wage as prescribed in Section 6(b) . . ." However, the total weekly benefits awarded may not exceed decedent's average weekly wages.

Accordingly, the Board remands this case to the

administrative law judge for a determination of whether a ten percent penalty must be assessed against the employer pursuant to Section 14(e) of the Act and for a correct computation of the amount of death benefits due decedent's widow and children. In all other respects, the Decision and Order appealed from is affirmed.

Dated This 20 day of
June, 1975

In the Matter of

LEE ROUSE (Deceased)
Claimant

v.

NORFOLK, BALTIMORE AND CAROLINA LINES, INC.
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

Case No. 74-LHCA-241

OWCP No. 555-42

Supplemental Order

In a decision dated June 20, 1975, the Benefits Review Board, United States Department of Labor, affirmed an award of benefit to the survivors of the deceased, Lee Rouse, under Section 9 of the Act, as amended.

The decision contains an Order of Remand for further proceedings:

> "Accordingly, the Board remands this case to the administrative law judge for determination of whether a ten percent penalty must be assessed against the employer pursuant to Section 14(e) of the Act and for a correct computation of the amount of death benefits due decedent's widow and children. In all other respects the Decision and Order appealed from is affirmed".

Accordingly, the Decision and Order, dated November 13, 1974 of Administrative Law Judge Marshall E. Miller is

corrected to conform to the Order of the Benefits Review Board, and the award shall be as follows:

1. The Employer-Carrier shall pay compensation as death benefits under Section 9 of the Act, as amended, beginning February 12, 1974, to the surviving widow, Nellie Smith Rouse, during widowhood, at the rate of 50 per centum of the national average wage, in effective at the time of Rouse's death, as determined under Section 6(b) of the Act, as amended, but not to exceed the average weekly wages of the deceased, and the additional amount of 16-2/3 per centum of such wage to the three minor children of the parties, Patricia Ann Smith, David Charles Smith, and Doreen Smith. Such payments shall be made in bi-weekly installments under the limitation of the Act until otherwise Ordered.

Within 15 days of the date of this Order, the Employer-Carrier is Ordered to show cause, before the undersigned, why an amount equal to 10 per centum of each unpaid installment should not be added to each such installment and paid in accordance with the provisions of Section 14(e) of the Act, as amended. The Claimant is hereby granted leave to submit evidence pertinent to the issue and/or response to the Employer-Carrier within 20 days of the date of this Order.

It is further Ordered that the provisions of Section 14(e) of the Act, as amended, shall lie against the Employer-Carrier if it fail to respond to the Order to Show Cause within the time specified, or any extension thereof for good cause shown, without further Order.

s/George A. Fath
GEORGE A. FATH
Administrative Law Judge

Dated: July 14, 1975
Washington, D. C.

In the Matter of

LEE ROUSE (deceased)
Claimant

v.

NORFOLK, BALTIMORE AND CAROLINA LINES, INC.
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

Case No. 74-LHCA-241

OWCP No. 555-42

Final Order Imposing
Provisions of Section 14(e) of the Act

In a decision, dated June 20, 1975 (BRB 75-101) the Benefits Review Board remanded this case ot the Administrative Law Judge for a correct computation of the amount of death benefits due decedent's widow and children, and for a determination of whether a ten percent penalty must be assessed against the employer pursuant to Section 14(e) of the Act.

A supplemental order issued on July 14, 1975, correcting the initial award of Administrative Law Judge Marshall E. Miller. The determination of the amount of compensation due was ordered based on the national average wage rather than on the average weekly wage of the deceased. In addition, the employer was directed to show cause why the provisions of Section 14(e) of the Act should not be imposed.

In response to the order to show cause, the carrier, acting

on behalf of the employer, submitted an affidavit, dated the 24th day of July, 1975, given by William [Wilfred] V. Moore, Claims Supervisor for Columbia, South Carolina Office of Liberty Mutual Insurance Company. Evidence contained in the affidavit pertinent to the employer-carrier compliance with Section 14 of the Act is as follows:

> "That upon learning on February 27, 1974 of the death of claimant Lee Rouse on February 11, 1974 compensation payments were stopped and a Form BEC-208 was submitted on February 27, 1974 reflecting the stopped payment on which it was noted: "We are investigating to see if the death is related to the accident;"
>
> ". . . deponent's file contains a copy of an April 26, 1974 letter from Mr. Gibbs to Claims Examiner Aaron M. Moore in the Jacksonville compensation office, in which the Jacksonville office was advised that Liberty was controverting &/or denying the subject claim and would not voluntarily accept it;"

Conclusions of Law

Section 14(e) of the Act provides:

> If any installment of compensation payable without award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such non-payment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

The affidavit submitted by the employer-carrier clearly shows that it did not comply with sections 14(b) and (d) of the Act within the required time. There is no evidence, and it is not contended, that nonpayment was excused by the deputy commissioner.

Under the circumstances of this case, the imposition of the penalty, under Section 14(e) of the Act, is mandatory. See *McCabe v. Ball Builders*, 1 BRBS 290, BRB 74-181 (Jan. 31, 1974).

Order

Therefore, it is Ordered that the employer-carrier pay such additional compensation as is provided in Section 14(e) of the Act, to wit:

> There shall be added to each installment of compensation, payable without an award, which was not paid within the fourteen days after it became due, an amount equal to 10 per centum thereof which shall be inaddition to such installment.

s/George A. Fath
GEORGE A. FATH
Administrative Law Judge

Dated: September 3, 1975
Washington, D. C.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1896

Norfolk, Baltimore and Carolina Lines, Inc., and Liberty Mutual Insurance Company,

Petitioners,

v.

Director, Office of Workers' Compensation Programs, United States Department of Labor; Benefits Review Board of the United States Department of Labor; and Lee Rouse (Deceased),

Respondents.

On Petition for Review of an Order of the Benefits Review Board.

(Argued April 6, 1976 Decided: Aug. 6, 1976

Before Bryan, Senior Circuit Judge, Craven and Russell, Circuit Judges.

Charles H. Gibbs (Stephen E. Darling, Sinkler Gibbs Simons & Guerard on brief) for Petitioners; Linda L. Carroll, U.S. Department of Labor, Joseph F. Kent, Neighborhood Legal Assistance Program, Inc. (Darra Williamson Cothran, Neighborhood Legal Assistance Program, Inc. on brief) for

Respondents: (William McL. Ferguson, Ferguson & Mason and Luther C. Jones, III, Seyfarth, Shaw, Fairweather & Geraldson on brief) as Amicus Curiae.

Albert V. Bryan, Senior Circuit Judge:

The Longshoremen's and Harbor Workers' Compensation Act was amended in 1972 to provide a death benefit to the survivors of an employee who has sustained "permanent total disability due to [an] injury and thereafter dies from *causes other than the injury*". 33 USC 901, 909. The employer and its insurance carrier, Norfolk, Baltimore and Carolina Lines, Inc. and Liberty Mutual Insurance Company, respectively, together appeal the decision of the Benefits Review Board approving the conclusions of the Administrative Law Judge* and directing an award under this amendment to the widow and children of Lee Rouse. 33 USC 921(c).

Appellants' case against the award is sharply made by this chronicle of the agreed facts: On *July 6, 1965* Rouse was injured while working as a longshoreman on navigable waters at Charleston, South Carolina; on *September 25, 1969* he was declared permanently and totally disabled by such injury; at all times — when he was employed, injured and found disabled — the law allowed *death* benefits *only* "[i]f the injury causes death"; in *1972* the amendment for the first time created benefits for a death not caused by the injury; on *February 11, 1974*, while disabled, he died, but *not as the result of the injury*.

On this factual predicate appellants contend that: (1) the Act as so amended contains inconsistencies and conflicting provisions, rendering application of the amendment impracticable; (2) the application of the 1972 amendment is

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*The Administrative Law Judge initially was George A. Fath and at the final stage was Marshall E. Miller.

retrospective and therefore unconstitutional as a denial of due process and an impairment of the obligation of contracts; and (3) because the amendment affords benefits for a death unrelated to maritime employment, it exceeds the constitutional grant to Congress of admiralty jurisdiction and is thus a legislative imposition amounting to a denial of due process, Article III, Section 2, Clause 1; Amendment V.

I.

Despite the possible incongruities charged to the Act as amended in 1972, the intention of Congress in its amendment of §909 of 33 USC remains altogether clear and intelligible. Predominantly stamped upon the amendment throughout is its purpose: to enlarge the recompense provided to the survivors of a longshoreman dying after suffering a permanent and total disability. *Cf.* Lawson v. Suwannee S.S. Co., 336 US 198, 201 (1949).

II

In defense to appellants' assault upon the amendment for its retrospectiveness, respondents aver that in truth there is no retroactivity. The Act gives two independent reparations, one for injury payable to the employee and another for the relief of his survivors. The second is a new cause of action, not existent during the decedent's lifetime. It does not become vested until death. Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F2d 76, 79 (4 Cir. 1950). Hence, respondents argue, there can be no retrospective play of it through the amendment into the ante-mortem period. Appellants' claim, nevertheless, is quite understandable, for as a practicable matter there is a death benefit post-1972 which was not there in previous years. However, resolution of this conflict of views is not required, since while statutes of retrospective force are not favored, they are not *per se* unconstitutional. Stephens v. Cherokee Nation, 174 US 445, 477 (1899). Furthermore, as appears in part III *infra*, generous

authoritative precedent enunciates the constitutional validity of the kind of amendment to the Longshoremen's Act as is now before us, repelling and removing the same question and doubt appellants press.

III.

The imputation of invalidity to the amendment on the basis of unrelatedness to maritime employment and consequently *ultra vires* the constitutional investment of admiralty jurisdiction, poses the real core and content of this case. Actually, the salient of the attack is not that the admiralty does not encompass redress for longshoremen's survivors. It is only that the jurisdiction does not embrace the very benefits purportedly conferred by the amendment. This, appellants argue, is because presently these benefits are without nexus to maritime injury — that they have no causal connection with something done or left undone within the province of admiralty.

To the contrary, we think the beneficences of the amendment are maritime in nature since they are in furtherance of the purpose of the Act, and at this date the constitutionality of the Longshoremen's Act is beyond debate. Crowell v. Benson, 285 US 22 (1932). The evident and outstanding wish of Congress was to assure indemnification of survivors of the inshore worker who had become utterly disabled in his work for the rest of his life.

Death benefits were included in the Act before the 1972 amendment, so that it did not introduce a novel or radical concept. This court has unequivocally insisted that they may constitutionally be increased after the injury and before death. Hampton Roads Stevedoring Corp. v. O'Hearne, supra, 184 F2d 76, 78 (4 Cir. 1950). That is precisely the immediate situation; the 1972 amendment enlarged those benefits in that interval.

Furthermore, contrary to appellants' advocacy, there was no constitutional inhibition on Congress to expand the causal clause of the original Act. This is true notwithstanding the employer and the insurer may have believed they had contractual rights in the limitation of benefits called for by the Act when, prior to 1972, they assumed these obligations. The amendment cannot be voided on the ground that it constituted an impairment of contracts, for the constitutional bar to such impairment is directed only to the States. Article I, Section 10.

Nor is the amendment an ordaining by Congress of a responsibility without due process. In Fleming v. Rhodes, 331 US 100, 107 (1947), the Court met this contention head-on:

> "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts".

Additionally to foster its paramount intendment of succor to the longshoreman's survivors, the amendment carries procedural assistance to them. It eases their burden of proving that the death was the result of the disabling injury. For years that has been the subject of much litigation. Cardillo v. Liberty Mutual Co., 330 US 469, 477-479, fn. 4 (1947).

As we discern no flaw in the decision of the Benefits Review Board, it will not be disturbed.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1896

Norfolk, Baltimore and Carolina Lines, Inc., and
Liberty Mutual Insurance Company,

Petitioners,

Newport News Shipbuilding and Dry Dock Company,
Amicus Curiae,

versus

Director, Office of Workers' Compensation Programs,
United States Department of Labor;
Lee Rouse (deceased),

Respondents.

ORDER

The petitioner's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote therein have voted to deny rehearing and rehearing en banc.

It is, therefore, ORDERED that rehearing and rehearing en banc be and they are hereby denied.

For the Court - By Direction.
s/William E. Skate, II, Clerk

A True Copy, Teste:
William K. Slate, II, Clerk

By E. Belton
Deputy Clerk